

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

In the Matter of:

YOUR PUBLIC RADIO CORPORATION,

Employer,

and

SCREEN ACTORS GUILD – AMERICAN
FEDERATION OF TELEVISION AND
RADIO ARTISTS, WASHINGTON – MID
ATLANTIC LOCAL, AFL-CIO

Petitioner.

Case No. 05-RC-130206

PETITIONER'S POST-ELECTION HEARING BRIEF

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TABLE OF CONTENTS

I.	Introduction	1-2
II.	Statement of the Facts	3-6
III.	Argument	6-33
	A. The Hearing Officer Appropriately Denied the Employer’s Motion in Limine to Exclude Evidence That Directly Addressed Whether Daniel Rodricks and Sheilah Kast Possess Section 2(11) Supervisory Authority.	6-8
	B. Rodricks and Kast Do Not Possess Section 2(11) Supervisory Authority Under the Act to Effectively Recommend Hiring Decisions.	8-20
	1. Kast and Rodricks Do Not Have the Exclusive Authority to Make Recommendations for Hire on their Respective Shows.	9-13
	2. Rodricks and Kast Do Not Effectively Recommend Hires on their Shows as Management is more than Routinely Involved in the Process.	13-16
	3. The Employer’s Sole Witness, Andrew Bienstock, Contradicts His Own Testimony and Documentary Evidence whereby his Credibility is Questionable at Best.	16-20
	C. Kyle Leslie is a Section 2(11) Supervisor, Manager and/or Closely Identified with Management.	20-33
	1. Kyle Leslie is a Statutory Supervisor as Defined by the Act.	20-24
	2. Kyle Leslie is a Manager as Defined by the Act.	24-26
	3. Kyle Leslie is Closely Identified with Management.	26-33

IV. Conclusion	
.....	34

TABLE OF AUTHORITIES

Primary Authority – Statutes

National Labor Relations Act, 29 U.S.C. §152	20, 21, 24
National Labor Relations Act, 29 U.S.C. §157	20

Primary Authority – Cases

<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974)	24
<i>NLRB v. Health Care & Ret. Corp. of America</i> , 511 U.S. 571 (1994)	21
<i>NLRB v. Ky. River Cmty. Care</i> , 532 U.S. 706 (2001)	21
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980)	24-25
<i>Evergreen America Corp. v. NLRB</i> , 362 F.3d 827 (D.C. Cir. 2004)	24-25
<i>675 W. End Owners Corp.</i> , 345 NLRB 324 (2005)	7
<i>Anamag</i> , 284 NLRB 621 (1987)	10
<i>Bosart Co.</i> , 314 NLRB 884 (1985)	26
<i>B-P Custom Building Products</i> , 251 NLRB 1337 (1980)	28-29, 33
<i>Chi. Metallic Corp.</i> , 273 NLRB 1677 (1985)	6, 18
<i>Children’s Farm Home</i> , 324 NLRB 61 (1997)	8-9
<i>Conn. Humane Soc’y</i> , 358 NLRB No. 31 (2012)	9-10
<i>DirecTV U.S.</i> , 357 NLRB No. 149 (2011)	9, 16
<i>Dole Fresh Vegetables, Inc.</i> , 339 NLRB 785 (2003)	19-20
<i>Family Service Agency, San Francisco</i> , 331 NLRB 850 (2000)	24
<i>Golden Crest Healthcare Ctr.</i> , 348 NLRB 727 (2006)	21
<i>Golden West Broadcasters</i> , 215 NLRB 760 (1974)	10

<i>Greenspan D.D.S., P.C.</i> , 318 NLRB 70 (1995)	10
<i>Hafadai Beach Hotel</i> , 321 NLRB 116 (1996)	7
<i>International Stamping Co.</i> , 97 NLRB 921 (1951)	33
<i>J.C. Penney, Corp.</i> , 347 NLRB No. 11 (2006)	8, 14
<i>King Broad. Co.</i> , 329 NLRB 378 (1999)	10
<i>Mid-Continent Spring Co.</i> , 273 NLRB 884 (1985)	26, 31, 33
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006)	21
<i>Peabody Evergreen Co.</i> , 95 NLRB 952 (1951)	26
<i>Southland Frozen Foods</i> , 282 NLRB 769 (1987)	27
<i>Starwood Hotels & Resorts Worldwide, Inc.</i> , 350 NLRB 1114 (2007)	22
<i>St. Francis Med. Ctr.-West</i> , 323 NLRB 1046 (1997)	22
<i>Sunward Materials</i> , 304 NLRB 780 (1991)	26-27, 30, 33
<i>Talmadge Park, Inc.</i> , 351 NLRB 1241 (2007)	10
<i>The Door</i> , 297 NLRB 601 (1990)	10
<i>Tree-Fiber Co.</i> , 328 NLRB 389 (1999)	10
<i>Westinghouse Broad. Co., Inc.</i> , 215 NLRB 123 (1974)	10

Primary Authority – NLRB Rules and Regulations

Board’s Rules and Regulations Sec.102.67(f)	7
NLRB Casehandling Manual (Part Two) Sec.11310.2	24, 26
NLRB Casehandling Manual (Part Two) Sec.11362.2	6

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..... 28

I. INTRODUCTION

On June 6, 2014, the Screen Actors Guild – American Federation of Television and Radio Artists, Washington – Mid Atlantic Local, AFL-CIO (“SAG-AFTRA” or “Union”) filed a representation petition with Region 5 of the National Labor Relations Board (“NLRB” or “Board”) to represent certain employees at WYPR 88.1 FM (“WYPR” or “Station”), a public radio station owned and operated by Your Public Radio Corporation (“Employer”) in Baltimore, Maryland. Those petitioned for employees covered “[a]ll full-time, part-time, and freelance hosts, reporters, producers, analysts, and new media professionals, employed by the Employer in Baltimore, Maryland, excluding all office-clerical employees, managerial employees, guards, and supervisors as defined by the National Labor Relations Act (“Act”). The Employer contended that show hosts Sheilah Kast (“Kast”) and Daniel Rodricks (“Rodricks”) were supervisors within the meaning of the Act, whereby SAG-AFTRA has at all times asserted that Kast and Rodricks do not possess supervisory authority under Section 2(11) of the Act.

The matter was heard by Region 5 before Hearing Officer Scott Bryson on June 20, 2014. After the hearing, the regional director determined by way of his Decision and Direction of Election dated July 7, 2014, that Kast and Rodricks have the authority to effectively recommend hires at WYPR and in turn possess statutory supervisory authority. On July 18, 2014, SAG-AFTRA requested review from the NLRB of the regional director’s Decision and Direction of Election as it pertained to Kast’s and Rodricks’ supervisory status. Per the Decision and Direction of Election, a representation election was held on July 30, 2014.

At the time of the election, seven challenges were made, which was held to be a determinative number of ballots to effect the outcome of the election. The NLRB denied SAG-AFTRA’s request for review of Kast’s and Rodricks’ supervisory status on July 31, 2014, but the

Board determined that any new evidence could be presented at a post-election hearing. On September 24, 2014, a post-election hearing was held before Hearing Officer Chad Horton. After various withdrawals of challenges and objections, the remaining issues to be determined via the post-election hearing were: (1) the Employer's Motion in Limine to Exclude Further Evidence Regarding the Supervisory Status of Rodricks and Kast, (2) the Board's challenge of Kast's and Rodricks' ballots, (3) the Union's challenge of Kyle Leslie's ("Leslie") ballot on the basis that he is a statutory supervisor or manager, and (4) the Union's objection to the conduct of the election based on Leslie serving as the Employer's observer at the July 30, 2014, election when he is a statutory supervisor or one closely identified with management.

As the arguments herein will outline, Employer's Motion in Limine should continue to be denied inasmuch as there is nothing in the Board's Rules and Regulations or decisions that requires that such new evidence be excluded with respect to Kast's and Rodricks' supervisory status. In fact, in order not to construe supervisory status too broadly, the Board should allow any new evidence that may support a finding that Kast and Rodricks are not statutory supervisors thereby allowing for the protection of their employee rights under the Act. Additionally, the Board's challenges as to Kast's and Rodricks' ballots should be overruled as the new evidence presented at the post-election hearing supports the Union's position that Kast and Rodricks do not have the authority to effectively recommend hires and therefore are not statutory supervisors. Third, the Union's challenge of Leslie should be sustained as the evidence presented shows that Leslie is a statutory supervisor and/or manager under the Act. Finally, the Union's objection as to Leslie serving as an observer should be sustained and a rerun election ordered as Leslie's status as a supervisor or one closely identified with management ruined the laboratory conditions of the election when he served as the Employer's observer.

II. STATEMENT OF FACTS

Your Public Radio Corporation is a Maryland non-profit corporation with a place of business located at 2216 North Charles Street in Baltimore, Maryland. Post-Election Hr’g Bd. Exh. 1(d) at 2. The Employer owns and operates radio station WYPR, which is “a non-commercial NPR affiliate, broadcasting news and information and entertainment programming for the Baltimore area, and with...translator stations to all across the state of Maryland.” Pre-Election Hr’g Tr. 11. Andrew Bienstock (“Bienstock”) is the vice president and program director at WYPR. Pre-Election Hr’g Tr. 11, 102. Post-Election Hr’g Tr. 63, 100. Post-Election Hr’g Bd. Exh. 1(d) at 2. Bienstock is in charge of the on-air programming at WYPR and the board operators. Pre-Election Hr’g Tr. 11. Post-Election Hr’g Tr. 100. Post-Election Hr’g Bd. Exh. 1(d) at 2. Bienstock reports to Anthony “Tony” Brandon (“Brandon”) who is WYPR’s president and general manager. Pre-Election Hr’g Tr. 26, 102. Post-Election Hr’g Tr. 113.

Kast reports to Bienstock in her role as host of Maryland Morning. Pre-Election Hr’g Tr. 12, 31, 99-102, 104. Maryland Morning airs on WYPR during a one hour slot beginning at 9:00 a.m. on Mondays, Wednesdays, and Fridays. Pre-Election Hr’g Tr. 31, 100. Post-Election Hr’g Tr. 37-38. This one hour slot contains about 37 minutes of Maryland Morning content with the rest being filled by content from other entities such as NPR and Johns Hopkins University. Post-Election Hr’g Tr. 37-39. Besides Kast, senior producer Matthew Purdy, producer Jamyla (Kay) Krempel, co-host/culture editor Tom Hall, and board operator/WYPR host for Morning Edition Nathan Sterner also work on Maryland Morning. Pre-Election Hr’g Tr. 31-32, 34, 44, 101. Post-Election Hr’g Bd. Exh. 1(d) at 9.

Like Kast, Rodricks reports to Bienstock in his role as host of the Midday show. Pre-Election Hr’g Tr. 12, 47-48, 50-51. The Midday show airs from 12pm to 2pm Monday through

Friday on WYPR. Pre-Election Hr'g Tr. 12, 48-49. Currently, senior producer Nikki Gamer ("Gamer"), associate producer (part-time) Mike Himowitz, and temporary producer Maureen Harvie ("Harvie") also work on the Midday show (along with board operator Luke Spicknall). Post-Election Hr'g Tr. 15, 109-110.

On June 20, 2014, then producer on the Midday show, Jonathan Ehrens ("Ehrens") gave Bienstock notice that he would be leaving WYPR's employment and effectively did so on July 3, 2014. Post-Election Hr'g Tr. 16. Since there was no word from Bienstock on hiring a replacement for Ehrens, Gamer suggested to Rodricks that they talk to people about possibly filling the position. Pre-Election Hr'g Tr. 17, 114-15. Gamer and Rodricks met with three previous interns of WYPR and on July 8, 2014, emailed Bienstock and Business Manager Brian Crompwell ("Crompwell"), who is involved in the hiring process, as to two people that they felt would be good fits for the Midday show. Post-Election Hr'g Tr. 17, 26-27, 33-34. Post-Election Hr'g Em. Exh. 1.

Bienstock did not respond to the email despite repeated follow-up attempts by Gamer and Rodricks to obtain some answers and direction on the matter of filling the open producer position from management. Post-Election Hr'g Tr. 18, 27, 114-15. Post-Election Hr'g Em. Exh. 5. In early August, Brandon approached Gamer about the open position and asked for an update on the search process. Post-Election Hr'g Tr. 18, 25. Brandon also informed Gamer of the FCC guidelines that she and Rodricks needed to follow while reviewing résumés and conducting interviews. Post-Election Hr'g Tr. 18-20, 25. Post-Election Hr'g U. Exh. 3, 4. At that time, Gamer asked Brandon for a temporary producer while she and Rodricks continued the interview process in compliance with the guidelines that he had raised. Post-Election Hr'g Tr. 19, 28. Brandon told Gamer that he would authorize Harvie to fill a temporary producer role until

Gamer and Rodricks finished the interview process and to have Harvie speak to Bienstock. Post-Election Hr’g Tr. 19, 27-28, 33, 108-09, 113, 116-17. Post-Election Hr’g U. Exh. 3, 4. In September Brandon followed up with Gamer and Rodricks as to the search process. Post-Election Hr’g Em. Exh. 2. As of the date of the hearing, it appeared that final interviews had been conducted for Ehrens’ vacant position, but a full-time replacement had not yet been hired. Post-Election Hr’g Tr. 29-31, 34-36. Post-Election Hr’g Em. Exh. 2. According to Bienstock, the hiring process at WYPR had not changed since the June 20, 2014 pre-election hearing. Post-Election Hr’g Tr. 106, 113.

Also employed at WYPR is Director of New Media Kyle Leslie. Post-Election Hr’g Tr. 69. Leslie has been employed at WYPR since 2006 and was the first (and only) Director of New Media at WYPR. Post-Election Hr’g Tr. 64, 70. WYPR employs two other directors in the programming department, Bienstock and News Director Joel McCord (“McCord”), both who are undisputed supervisors and/or managers. Post-Election Hr’g Tr. 43-44, 76, 100. Bienstock described Leslie’s duties as a “sort of interface between the program department and other departments into getting things onto our website.” Post-Election Hr’g Tr. 102.

While Bienstock claims that he has the ultimate authority over the website, WYPR staff employees claim that it is Leslie who actually oversees and manages the website. Post-Election Hr’g Tr. 44, 64, 67-68, 71-74, 89, 101-02, 104. Leslie notifies employees about errors in posting content to the website, trains employees on the website, provides feedback to employees on the performance of the content they have posted, receives concerns from employees about technical and substantive issues on the website, and oversees WYPR’s Twitter feed, among other things. Post-Election Hr’g Tr. 44-47, 64-69, 72-74, 83-84, 88-89. Post-Election Hr’g U. Exh. 1. Louisa Jonas, a web content producer, worked in Leslie’s department sometime between 2007 and 2009,

and there may currently be a part-time or freelance person working in his department. Post-Election Hr'g Tr. 71, 82, 105. Leslie has also been seen by employees attending manager meetings. Post-Election Hr'g Tr. 75-76, 83.

III. ARGUMENTS

A. The Hearing Officer Appropriately Denied the Employer's Motion in Limine to Exclude Evidence That Directly Addressed Whether Daniel Rodricks and Sheilah Kast Possess Section 2(11) Supervisory Authority.

The hearing officer did not err by denying the Employer's Motion in Limine. The Employer sought to exclude evidence that directly addressed a critical issue in this case – whether Rodricks and Kast actually possess supervisory authority to effectively recommend hiring decisions. Despite the Employer's claims to the contrary, there is nothing in the Board's Rules and Regulations or Board decisions that requires the evidence the Union introduced be excluded.

First, “the Board has a duty to employees to be alert not to construe supervisory status too broad because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.” *Chi. Metallic Corp.*, 273 NLRB 1677, 1689 (1985). To ensure that the rights of Kast and Rodricks are being protected and as the processing of challenges is to be non-adversarial, it is incumbent on the Region, per the Board's determination, to ensure that “all available facts have been obtained.” NLRB Casehandling Manual (Part Two) Sec.11362.2. As such, any new evidence as to Kast's and Rodricks' employment status should have been collected and given consideration by the Region.

Second, the Employer's Motion in Limine misquotes and misconstrues the Board's Rules and Regulations and Board cases regarding the exclusion of evidence. In its motion, the Employer states:

The Board's Rules and Regulations state that denial by the Board of a request for review constitutes "an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent...proceeding." Rules and Regs. at § 102.67(f). *See also Hafadai Beach Hotel*, 321 NLRB 116 (1996) (denial of request for review barred relitigation of jurisdictional issue in subsequent related proceeding); *675 W. End Owners Corp.*, 345 NLRB 324 (2005) (employer's failure to request review of dismissal of objection constituted bar to employer later raising same issues in subsequent phase of litigation).

Em. Mtn. in Limine at 2.

Section 102.67(f) of the Board's Rules and Regulations, when read in its entirety, actually states, "Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." Rules and Regs. at § 102.67(f) (emphasis added). Both cases the Employer cited in its motion actually stand for the proposition that representation issues cannot be relitigated in a subsequent unfair labor practice proceeding. *Hafadai Beach Hotel*, 321 NLRB at 117; *675 W. End Owners Corp.*, 345 NLRB at 324. In *Hafadai*, the Board even distinguished between the "prior [representation] proceedings" (plural, not singular) and the unfair labor practice case. *Hafadai*, 321 NLRB at 317-318. Here, the June 20 pre-election hearing and the September 24 post-election hearing are the representation proceedings to determine voter eligibility. As per the Board's order, it was appropriate to permit Rodricks and Kast to vote subject to challenge and hear additional evidence on their status. Post-Election Hr'g Bd. Exh. 1(g). Because the September 24 hearing was not a subsequent unfair labor practice proceeding, Section 102.67(f) does not preempt the introduction of additional evidence.

Third, the evidence presented by the Union at the September 24 hearing does not constitute "relitigation." The Union did not present evidence that could have been or had been raised at the June 20 hearing. The evidence, which emerged between June 20 and September 24,

concerned the WYPR hiring process as it existed prior to the July 30 election. While it certainly raised questions as to the veracity of Bienstock's testimony at the June 20 pre-election hearing and affirmed the Union's position that WYPR has structured the hiring process as a collaborative process for each show, the evidence is new and relevant, not merely cumulative. As the evidence could not have been raised at the initial hearing and given the Board's commitment to ensure all available facts have been obtained and considered, allowing this evidence to be introduced does not constitute a second bite at the apple. Accordingly, it was not error for the hearing officer to permit the Union to introduce such evidence and afford it appropriate weight.

B. Rodricks and Kast Do Not Possess Section 2(11) Supervisory Authority Under the Act to Effectively Recommend Hiring Decisions.

On June 20, 2014, a pre-election hearing was held before Region 5 regarding the supervisory status of Kast and Rodricks. The regional director issued his Decision and Direction of Election, whereby the regional director found that both Kast and Rodricks were statutory supervisors on the sole basis that they both had the authority to effectively recommend hires at WYPR and as such should not be included in the unit. Post-Election Hr'g Exh.1(d) at 13-15, 19. While the Union filed a request for review with the Board on this matter, the Employer did not file a request for review on any of the other indicia for which the regional director did not find supervisory indicia. Additionally, the Employer did not submit any further evidence at the post-election hearing held on September 24, 2014, regarding any of the other indicia. The Union, however, did present additional evidence at the post-election hearing on the issue of the authority to effectively recommend hire.

"The power to effectively recommend a hire, as used in Section 2(11), contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process." *J.C. Penney, Corp.*, 347 NLRB No. 11, 128 (2006). The test is "not simply

[whether] the recommendation is ultimately followed.” *Children’s Farm Home*, 324 NLRB 61, 61 (1997). Instead, to be an “effective recommendation,” the action must generally be taken without an independent investigation by superiors. *DirecTV U.S.*, 357 NLRB No. 149, *3 (2011).

At the post-election hearing, Bienstock testified that nothing had changed in the hiring process since the June 20, 2014 pre-election hearing. Post-Election Hr’g Tr. 106, 113. It would presumably be the Employer’s position, then, that the ongoing process that has occurred in filling Ehren’s vacant producer position on Middays would have applied prior to June 20, 2014. The testimony at the post-election hearing shed some much needed light on this hiring process that per the Employer has remained unchanged. First of all, the record never supported a finding that both Rodricks and Kast were delegated the authority to recommend hiring decisions inasmuch as other staff from the shows are definitely involved in the interview and recommendation process. Secondly, it is clear that management plays a role in the hiring process beyond simply talking to new hires about salary. Third, the Employer’s sole witness at both the pre-election and post-election hearings contradicts his own and other record testimony so much so that his veracity is questionable at best.

1. Kast and Rodricks Do Not Have the Exclusive Authority to Make Recommendations for Hire on their Respective Shows.

The Board has held that participation in a group interview or group recommendation is not itself sufficient to establish an effective recommendation. *Conn. Humane Soc’y*, 358 NLRB No. 31 (2012). In *Connecticut Humane*, Lord, the alleged supervisor, was asked by her supervisor to interview a potential candidate and provide input about whether the candidate would fit with the employer’s management team. *Id.* at *20. Lord interviewed the prospective candidate with three other employees and, afterward, the four met to discuss whether they “liked” the candidate. *Id.* The Board affirmed the regional director’s determination that the

record did not support a finding that Lord effectively recommended hiring decisions. *Id.* at *1.

The regional director found that

the best that can be said for Lord's participation in this process is that she is part of a group recommendation that the applicant would be a good fit for the organization. This kind of a "recommendation" is considered to be merely an assessment of "compatibility," and does not support a finding of a hiring authority within the meaning of Section 2(11).

Id. at *20-21, citing *Talmadge Park, Inc.*, 351 NLRB 1241, 1244 (2007); *Tree-Free Fiber Co.*, 328 NLRB 389, 391 (1999), *Greenspan D.D.S., P.C.*, 318 NLRB 70, 76-77 (1995), *enfd. mem.* 101 F.3d 107 (2d Cir. 1996); *Anamag*, 284 NLRB 621, 623 (1987). Furthermore, even if the assessment could be construed as a recommendation, the evidence did not show "that Lord's purported recommendation would have carried more weight than that of the other interviewers or, indeed, any weight at all." *Id.* at *20, citing *The Door*, 297 NLRB at 602. Additionally, in Board decisions addressing other Section 2(11) indicia, the Board has found that purported supervisors who work in conjunction with other employees in a collaborative endeavor are not 2(11) supervisors. *See e.g., King Broad. Co.*, 329 NLRB 378 (1999) (finding producers did not possess Section 2(11) authority to assign because assignments were a "collaborative effort" amongst the news staff); *Golden West Broadcasters*, 215 NLRB 760 (1974) (finding the directors are not supervisors but, rather, "function only as part of an integrated production team"); *Westinghouse Broad. Co., Inc.*, 215 NLRB 123 (1974) (finding the "producer/directors function not as supervisors, but as part of an integrated production team").

At the pre-election hearing, there was significant testimony that Rodricks' and Kast's participation in the hiring process is very similar to the facts that were at issue in *Connecticut Humane* as each interviews and evaluates candidates in conjunction with the other employees on the Midday show and Maryland Morning, respectively. Pre-Election Hr'g Tr. 56-57, 77-78, 109-

110, 126-127, 144. Pre-Election Hr'g U. Exh. 1. The process was a collaborative endeavor where each individual was given equal consideration. Pre-Election Hr'g Tr. 109-110, 145. Pre-Election Hr'g U. Exh. 1. Additionally, Kast testified at length that any communication she was involved in concerned whether the prospective candidate would be a good fit with the show's current employees. Pre-Election Hr'g Tr. 109-110, 126-127. Most importantly, the record at the pre-election hearing demonstrated that, contrary to Bienstock's claims, management did not place greater weight in a recommendation that came from Rodricks or Kast as compared to executive producer Vanessa Eskridge, senior producer Lawrence Lanahan, producer Katherine Gorman, co-host Tom Hall, or host/board operator Nathan Sterner. Pre-Election Hr'g Tr. 57-58, 110. Pre-Election Hr'g U. Exh. 1.

At the post-election hearing, the current senior producer of the Midday show, Nikki Gamer, supported the pre-election hearing testimony in that the shows, Maryland Morning and Midday, collectively amongst their staffs review résumés, interview potential candidates, and collectively inform management as to who they would like to see offered the position. Compare Post-Election Hr'g Tr. 17, 22, 26-27, 29-31, 33-36 and Post-Election Hr'g Em. Exh. 1, 5 with *supra* pp. 10-11. Additionally, it is clear that management's actions, as articulated in the post-election hearing testimony, back an expectation from management that the hiring recommendations be decided upon collaboratively amongst the shows' staffs and that no more weight is given to Rodricks' recommendation than is given to Gamer's. Post-Election Hr'g Tr. 18-20, 24-25, 29-31. Post-Election Hr'g Em. Exh. 2. The same would presumably hold true of the hiring process on Maryland Morning.

Brandon went to Gamer and spoke to her about the criteria she and Rodricks needed to use in going through the interview process and followed up with both of them on the process.

Post-Election Hr’g Tr. 18-20, 24-25, 29-31. Post-Election Hr’g Em. Exh. 2. WYPR’s general manager going to the show’s senior producer about the hiring process and asking both Gamer and Rodricks for an update calls into question what independent judgment Rodricks (and in turn Kast) is using to make these supposed effective recommendations for hire. It is clear by management’s actions that they expect the collective employees on the shows to work through the initial steps of the hiring process, not Rodricks or Kast individually and independently.

Among the various conversations and emails with Brandon and Bienstock regarding the hiring of a new producer, Gamer was also never told that Rodricks should be the only one conducting interviews and reviewing résumés. Post-Election Hr’g Tr. 23. Gamer’s own testimony is supported by Brandon approaching her about the hiring process and explaining it to her so she and Rodricks could both be aware of how they collectively should be interviewing candidates. See supra p.11. Neither Brandon nor Bienstock ever instructed Gamer that she was to defer to Rodricks on hiring recommendations or the hiring process. Post-Election Hr’g Tr. 22-23.

Despite initially testifying that Rodricks recommended the hire of Harvie, Bienstock contradicted himself throughout his testimony by continually stating things such as “I followed Dan and Nikki’s recommendation to hire her...” Post-Election Hr’g Tr. 106-09, 113, 115. The documentary evidence supported this exact point – that both Gamer and Rodricks were pushing management to do something about the open position as they realized they were in desperate need of another producer and collectively thought Harvie would be a good fit for their show. Post-Election Hr’g Em. Exh. 1, 5. This further bolsters the testimony from the pre-election hearing that the hiring process on the Midday show and Maryland Morning is supposed to be a

collaborative endeavor. Pre-Election Hr’g Tr. 56-57, 77-78, 109-110, 126-127, 141, 144-145.
Pre-Election Hr’g U. Exh. 1.

Kast summarized the hiring process so articulately at the pre-election hearing as follows:

[I]f we get authority to post a position and applications start coming in, then as we get them, my producers and I will review them. Sometimes we split them up. Sometimes we do it as a group. We’ll figure out the ones who seem most promising and arrange a time to talk to them either in person or by phone. We try before that to come up with a parallel set of questions that we all think should be asked, and then we’ll do those interviews as a group and sort of rank the applicants, try to figure out who we think would be the best fit for what the show needs at that point, and then usually my senior producer and I will convey to Andy [Bienstock] who we [the employees employed on Maryland Morning] think the best, the best fit would be for our show.

Pre-Election Hr’g Tr. 109-110. This is the way the process actually works at WYPR and the new evidence introduced at the post-election hearing clearly supports that notion and management’s affirmation of that process. As such, the regional director’s statement that “Bienstock defers to Rodricks and Kast, and has relied *exclusively* on their recommendations when making job offers” was based on inaccurate evidence. Post-Election Hr’g Bd. Exh. 1(d) at 15 (emphasis added). It is clear that management’s hiring decisions are not exclusively based on the recommendations of Kast and Rodricks and the regional director’s decision that Kast and Rodricks are statutory supervisors should therefore be overturned.

2. Rodricks and Kast Do Not Effectively Recommend Hires on their Shows as Management is More than Routinely Involved in the Process.

In his Decision and Direction of Election following the June 20, 2014, hearing, the regional director stated that “Bienstock’s role is limited to discussing salary and making job offers to those candidates whose salary demands accord with the Employer’s budget. Bienstock’s role is hardly that of an independent review of the recommendation from either Rodricks or

Kast.” Post-Election Hr’g Bd. Exh. 1(d) at 15. There is no discussion in the regional director’s decision about any role that Brandon may have played in reviewing candidates or even any involvement of Business Manager Crompwell even though both were mentioned throughout the pre-election hearing. The only management individual given any sort of consideration in the regional director’s Decision and Direction of Election is Bienstock and that appears to be a wholesale agreement with everything Bienstock said. At the post-election hearing, however, Brandon’s, Bienstock’s, and even Crompwell’s roles in the hiring process are again called into question with the new evidence presented.

In *J.C. Penney*, the Board reversed the hearing officer’s recommendation that Pawlak, a training supervisor, was a Section 2(11) supervisor because she effectively recommended hiring decisions. 347 NLRB at 127. The Board found that while Pawlak did interview candidates, she had no authority to hire candidates herself and the candidates she “recommended” were subsequently interviewed by managers with hiring authority. *Id.* at 129. It is undisputed in the instant case that Rodricks and Kast have no authority to hire candidates directly. Pre-Election Hr’g Tr. 55, 108. Post-Election Hr’g Bd. Exh. 1(d) at 13. The question then turns on the involvement of management in the hiring process.

At the pre-election hearing Bienstock contended he had only participated in salary discussions with producer candidates, while the record evidence indicates that he had a much greater role in the process on numerous occasions. Compare Pre-Election Hr’g Tr. 14 with Pre-Election Hr’g Tr. 32-33, 58, 61, 76, 137 and Pre-Election Hr’g U. Exh. 1. In fact, with respect to the hiring of a producer on Maryland Morning there is documentary evidence that states that “Sheilah [Kast], Katherine Gorman, Andy Bienstock and I [Lawrence Lanahan] have all settle[d] on the top three candidates in this order . . . Tom and Nathan, I wanted to see if either of you had

any objection to that.” Pre-Election Hr’g U. Exh. 1. Additionally, at the post-election hearing Gamer testified undisputed, not once, but twice, that Bienstock interviewed her before offering her the position on Middays. Post-Election Hr’g Tr. 17, 21.

As to Harvie, both Gamer and Rodricks, contacted Bienstock and Cromptwell about Harvie, including providing her résumé, samples of her work, and recommendations from other WYPR employees. Post-Election Hr’g Tr. 17, 26-27, 33-34. Post-Election Hr’g Em. Exh. 1, 5. When asked whether he reviewed Harvie’s résumé, Bienstock initially testified that he had not, but then later testified that he had looked at her résumé. Compare Post-Election Hr’g Tr. 109 with Post-Election Hr’g Tr. 125. It is questionable why, if Rodricks supposedly had the known authority to effectively recommend a hire, he and Gamer would have sent over documentation to Bienstock and Cromptwell backing their rationale that Harvie would be a good fit for the show unless management actually requires such documentation for further review of the candidate. If there was no independent review by management, then supplying them with such information would be unnecessary.

Bienstock stated that Brandon gets involved with the hiring process. Post-Election Hr’g Tr. 118. Bienstock further testified that he consults with Brandon on all hires and “talk[s] with him about who the person is, what we can afford to pay, what I think we can afford to pay, and get his ultimate green light on it.” Post-Election Hr’g Tr. 120-21. As to Brandon’s involvement, the pre-election hearing testimony is relatively silent on his involvement in the hiring process other than some indication that Brandon may have conducted an independent interview with a producer candidate on Midday. Pre-Election Hr’g Tr. 79. In the post-election hearing, however, there are several indications that Brandon is involved in the hiring process. First, Bienstock testified as much in terms of all hiring processes. See *supra* p.15. Bienstock tries to water down

his consultations with Brandon by stating that he does not consult with Brandon as to applicants or résumés, though he stated earlier in his testimony that he does in fact talk to Brandon about the actual candidate, not just money. Compare Post-Election Hr’g Tr. 125 with Post-Election Hr’g Tr. 121. Additionally, the breadth of such a consultation must also be called into question when Brandon brings up Harvie to Gamer without Gamer ever having mentioned the possible candidate to Brandon. Post-Election Hr’g Tr. 20, 27-28, 33. Post-Election Hr’g Em. Exh. 1. After a month or more of not hearing from Bienstock, it was Brandon who approached Gamer about the producer position. Post-Election Hr’g Tr. 16-18. Brandon was also the one seeking updates on the interview process for the producer position and instructing Gamer on the guidelines for interviewing. Post-Election Hr’g Tr. 18, 25. Post-Election Hr’g Em. Exh. 2.

As each manager may potentially conduct an independent investigation, the regional director should have discussed Brandon’s possible involvement as well as Crompwell’s for that matter. *DirecTV U.S.*, 357 NLRB No. 149, *3 (2011). Relying heavily on Bienstock’s testimony in the pre-election hearing and not giving weight to the documentary evidence was clearly in error, especially given the evidence in the post-election hearing. Thus, the regional director should not have found that Rodricks and Kast possess Section 2(11) supervisory authority to effectively recommend hires when the independent review of Bienstock, Brandon, and Crompwell are all in question.

3. The Employer’s Sole Witness, Andrew Bienstock, Contradicts His Own Testimony and Documentary Evidence whereby his Credibility is Questionable at Best.

The regional director in his Decision and Order of Election stated that:

Bienstock testified that both Rodricks and Kast create job descriptions for their prospective producers, screen application materials received from prospective producers, interview prospective producers, and make recommendations to Bienstock

regarding their preferred candidates. At times, Rodricks and Kast have submitted a single name to Bienstock; other times, Bienstock receives a list of candidates. Once Rodricks or Kast has made their recommendation to Bienstock for the hiring of an employee, Bienstock's role is limited to discussing salary and making job offers to those candidates whose salary demands accord with the Employer's budget. Bienstock's role is hardly that of an independent review of the recommendation from either Rodricks or Kast. Bienstock defers to Rodricks and Kast, and has relied exclusively on their recommendations when making job offers.

Post-Election Hr'g Tr. 1(d) at 14-15. Even when contradictory evidence (even contradictory documentary evidence) was offered, the regional director seems to have placed significant weight on Bienstock's testimony in the pre-election hearing to find that Kast and Rodricks effectively recommend hires. For instance, in the pre-election hearing Bienstock originally stated that Rodricks books his own guests, but later stated that the Midday show's producers actually book the guests. Pre-Election Hr'g Tr. 13, 29. Furthermore, despite claiming intimate knowledge of Rodricks' and Kast's interactions with other employees, Bienstock later contradicted that assertion, stating that he is not involved in "the day-to-day affairs of any of [WYPR's] programs" and is unaware of the actual interaction between the host, senior producer, and other staff. Pre-Election Hr'g Tr. 36. That assertion was confusing as Bienstock described one of his own duties as possessing "overall charge of everything that goes on the air at WYPR." Pre-Election Hr'g Tr. 11. Another example of Bienstock's questionable testimony is his statement that all he does with respect to the hiring process on Maryland Morning and Midday is to discuss salary with the jobs candidates, however, the Union offered documentary evidence showing that Bienstock was intimately involved in the hiring process on Maryland Morning. Compare Post-Election Hr'g Bd. Exh. 1(d) at 15 with Pre-Election Hr'g U. Exh. 1. These are but a few examples from the pre-election hearing where Bienstock contradicted himself.

Given the continued trend of contradictions and inconsistencies in Bienstock's post-election hearing testimony, however, Bienstock's lack of credibility must be called into question at this point as it pertains to his testimony at both hearings. As the Employer's sole witness at both hearings, it stands to reason that Bienstock's credibility issues need to really be assessed especially when that is the only evidence being offered that may cause the Board to continue to make an overbroad interpretation of supervisory status thereby denying Kast and Rodricks their employees' rights under the Act and unduly harming them. *Chi. Metallic Corp.*, 273 NLRB at 1689.

As noted supra, Bienstock contradicts himself, and the documentary evidence, when he testified that Rodricks made the decision to hire Harvie, that "she was his choice," and then turns around and testifies that Rodricks and Gamer made the recommendation. See supra p. 12. Post-Election Hr'g Tr. 106-09, 113, 115. The Employer's own documentary evidence supported the point that it was a joint recommendation from Rodricks and Gamer. Post-Election Hr'g Em. Exh. 1, 5. Bienstock further testified that he was the one that made the decision that Harvie could only be temporary. Post-Election Hr'g Tr. 108, 113. At a later point in his testimony, however, Bienstock actually admitted to having done nothing since Gamer's July 8, 2014 email. Post-Election Hr'g Tr. 114-15. Gamer also testified that after several attempts to prompt Bienstock about hiring a producer, whether full-time or temporary, into the vacant position she made the plea to Brandon and Brandon made the decision on the spot that Harvie could be brought on as a temporary. Post-Election Hr'g Tr. 19, 27-28. Furthermore, Brandon sent an email to Rodricks and Gamer copying Bienstock and Crompwell stating that "I [Brandon] have authorized MidDay to hire a temporary person to fill the job until a reasonable number of candidates are interviewed." Post-Election Hr'g U. Exh. 3. Bienstock attempts to remedy the

contradictory evidence by stating that he made the decision in consultation with Brandon, despite Brandon clearly notifying Bienstock that he, Brandon, had made the decision. Post-Election Hr’g Tr. 117.

Bienstock also contradicted himself by testifying that he talks to Brandon about who job candidates are, but that he does not consult with Brandon about the applicants or their résumés. Compare Post-Election Hr’g Tr. 121 with Post-Election Hr’g Tr. 125. It is also questionable that Bienstock looks at résumés, but does not do any independent review of said résumés. Compare Post-Election Hr’g Tr. 124-25 with Post-Election Hr’g Tr. 109.

Bienstock goes on to further contradict his testimony with respect to Kyle Leslie as discussed *infra*. Bienstock testified at the pre-election hearing as to those exact people who directly report to him and then adds another ten people to that list, including Leslie, when going down the same line of questioning in the post-election hearing as it pertained to a questionable organizational chart. See *infra* pp.29-30. Even though Bienstock testifies that he is responsible for all programming that goes on air, in the post-election hearing he is all of a sudden (later in his testimony) responsible for the WYPR website as well. See *id.* Compare Post-Election Hr’g Tr. 100 and Pre-Election Hr’g Tr. 11 with Post-Election Hr’g Tr. 105. Additionally, in the pre-election hearing Bienstock asserted that Rodricks and Kast attended manager only meetings, even though Rodricks and Kast testified otherwise, but in the post-election hearing, to serve the Employer’s position as to Leslie, Bienstock testified that those meetings were interdepartmental meetings not limited to managers. See *infra* pp. 31-32.

Given all of these contradictions and inconsistencies in his testimony, little if any weight should have been given or should be given to Bienstock’s testimony at either hearing. The Board will not find supervisory status “where the evidence is in conflict or otherwise

inconclusive.” *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Bienstock’s lack of credibility, which became so transparent at the post-election hearing, dilutes any argument that the Employer may have had with respect to Rodricks’ and Kast’s status as supervisors. As such, the previous ruling on Rodricks and Kast should be overturned, they should be placed in the unit, and their votes should be counted for purposes of the July 30 representation election.

C. Kyle Leslie is a Section 2(11) Supervisor, Manager and/or Closely Identified with Management.

At the July 30, 2014 representation election, the Union properly challenged Leslie’s ballot claiming that he was a supervisor and/or manager as defined under the Act. The Union also objected to the election on the grounds that Leslie was a statutory supervisor or closely identified with management when he served as the Employer’s election observer on July 30, 2014. Post-Election Hr’g Bd. Exh. 1(g) at 3. Based on Leslie’s status as a statutory supervisor or manager, he should not be included in the unit and his ballot should not be counted. Additionally, based on his status as a statutory supervisor or being one closely identified with management when he served as the election observer, the July 30, 2014 representation election should be set aside and a rerun election ordered.

1. Kyle Leslie is a Statutory Supervisor as Defined by the Act.

Only an “employee” may organize under the Act. 29 U.S.C. §157. Section 2(3) of the Act states that “the term employee...shall not include...any individual employed as a supervisor.” *Id.* at §152(3). Thus, supervisors are barred from organizing under the Act. Section 2(11) of the Act defines a “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in

connection with the foregoing exercise the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id. at §152(11). Pursuant to that definition, individuals are statutory supervisors if “(1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’” *NLRB v. Ky. River Cmty. Care*, 532 U.S. 706, 713 (2001), quoting *NLRB v. Health Care & Ret. Corp. of America*, 511 U.S. 571, 573-74 (1994).

The Board has interpreted the term “assign” in Section 2(11) to mean the act of “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). However, “choosing the order in which the employee will perform discrete tasks” or “ad hoc instructions that the employee perform a discrete task” is not indicative of the authority to assign. *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 728-29 (2006); *Oakwood Healthcare*, 348 NLRB at 689.

While Bienstock made a conclusory statement that Leslie had no authority to make assignments of work to other employees, Bienstock never testified that Leslie could not effectively recommend assignments of other employees. Post-Election Hr’g Tr. 103. Either Bienstock’s testimony as to Leslie’s authority to assign is inaccurate or Leslie has the authority of effectively recommending assignments as the record reflects Leslie’s involvement in various assignment of duties to the WYPR staff. The testimony is undisputed that Leslie assigned and required the WYPR production department to attend an eight week web training session that would have taken them away from their regularly assigned duties and locations within the

station. Post-Election Hr'g Tr. 65-66, 86-88. Although Bienstock claims to oversee the WYPR website, it is Leslie who establishes the staff's duties as it pertains to the website. Post-Election Hr'g Tr. 44-47, 67-69, 72-74, 101-02, 104-05. Post-Election Hr'g U. Exh. 1. Leslie monitors how the staff is interacting with the website in the course of their duties and questions and informs staff when they are performing their duties incorrectly. Post-Election Hr'g Tr. 47, 67-68. Post-Election Hr'g U. Exh. 1. Whether it is in the context of a byline to a web posting, length of content on the website, or web training, the employees perceive Leslie as having the ultimate authority over assigning how they are to perform those specific duties. Post-Election Hr'g Tr. 44, 47, 65-68. Based on Bienstock's own testimony that Leslie is the interface on getting things onto the website and the various staff interactions with Leslie, it is reasonable that Leslie has the authority to assign employees duties in order to make that interaction happen or reflects at the least that he has the authority to effectively recommend such assignments. Post-Election Hr'g Tr. 102.

Indicia in addition to those set forth under Section 2(11) of the Act, are considered secondary indicia. *St. Francis Med. Ctr.-West*, 323 NLRB 1046, 1047 (1997). Secondary indicia alone is insufficient to establish supervisory status. *Id.* Primary indicia under the Act must be present, and the secondary indicia simply lends support to the primary indicia for supervisory status. *Id.* Secondary indicia includes things such as absence of other supervision, availability of highest person in charge, salaries, additional benefits (such as separate offices), keeping of time records, how the individual is regarded among other employees, and attendance at management meetings. *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1118 (2007); *St. Francis Med. Ctr.-West*, 323 NLRB 1046, 1047 (1997).

In addition to Leslie's authority to assign or effectively recommend such assignment, there are various secondary indicia that bolster the position that Leslie is a statutory supervisor. Although an employee testified that they saw Leslie go into a manager only meeting, Bienstock testified that Leslie did not attend manager only meetings. Compare Post-Election Hr'g Tr. 75-76, 83 with Post-Election Hr'g Tr. 110-111, 124. As noted *supra* and *infra* Bienstock's testimony as to this matter is questionable at best and should be afforded no weight. The employee's testimony that Leslie attended manager only meetings should stand and be considered as secondary indicia with respect to Leslie's status as a statutory supervisor.

Matthew Purdy testified that Leslie oversees the website, not Bienstock. Post-Election Hr'g Tr. 44. Aaron Henkin ("Henkin") testified that Leslie has his own department and Leslie even told Henkin he was the manager of his own department. Post-Election Hr'g Tr. 71, 77-78, 85-86. Additionally, as to Louisa Jonas, it is undisputed that Jonas worked as a web producer in Leslie's department. Post-Election Hr'g Tr. 71, 105. There is also a question amongst employees whether there is presently a part-time or freelance person working in that department for which Leslie oversees. Post-Election Hr'g Tr. 71. Furthermore, Leslie is one of three individuals in the programming department that holds a "director" title. Post-Election Hr'g Tr. 43-44, 76. Post-Election Hr'g Em. Exh. 4. The other two individuals are both undisputed supervisors/managers. Post-Election Hr'g Tr. 43-44, 76. Post-Election Hr'g Em. Exh. 4. It is clear that amongst staff, Leslie is perceived as a supervisor and/or manager.

Another piece of secondary indicia to consider is that Leslie has his own standalone office away from the rest of the programming staff. Post-Election Hr'g Tr. 74, 90, 92-93. Most production employees are assigned to cubicles. Post-Election Hr'g Tr. 74, 92. While there are a few other production employees that have their own offices, they are typically tied in within the

bullpen of their particular show. Post-Election Hr'g Tr. 90-93, 96-97. The totality of the secondary indicia provides further support that Leslie is a statutory supervisor.

In light of the foregoing, the Union's challenge as to Leslie's ballot should be sustained. As such Leslie should not be counted in the unit and his ballot should not be counted. Additionally, pursuant to the Board's rules, it is per se objectionable for a statutory supervisor to serve as the observer at an election. NLRB Casehandling Manual (Part Two) Sec.11310.2; *Family Service Agency, San Francisco*, 331 NLRB 850 (2000). As such, the Union's objection as to Leslie serving as the Employer's observer at the July 30 representation election should also be sustained and a rerun election ordered.

2. Kyle Leslie is a Manager as Defined by the Act.

The Act itself only extends its protections to workers that meet the statutory definition of "employee." 29 U.S.C. § 152(3). In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Supreme Court held that Congress also intended to exclude "managerial" employees from protections under the Act. The test for determining whether an employee is "managerial" is distinct from the supervisory authority analysis under Section 2(11). The managerial test examines whether an employee can "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* at 288.

"Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management." *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980). In determining whether an employee is "managerial," "[t]he Supreme Court has made clear that 'employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned' are not managers." *Evergreen America Corp. v. NLRB*, 362 F.3d 827, 838 (D.C. Cir. 2004), quoting

Yeshiva, 444 U.S. at 690. Unlike supervisory status, the managerial exception does not encompass employees that merely have the authority to recommend discretionary actions that effectively implement management policies. *Id.* at 839.

There was testimony at the post-election hearing that there is no formal employer policy as it pertains to the WYPR website. Post-Election Hr'g Tr. 54. According to the Employer, Leslie is the interface between the departments and getting content on the WYPR website. Post-Election Hr'g Tr. 102. Since there is no formal written policy as to the website, when Leslie establishes things such as how bylines for Maryland Morning should list either the host or co-host and not the producers that wrote the copy, he is establishing the employer's policy for how that work flow should occur. Post-Election Hr'g U. Exh. 1. This is especially true when the staff involved "weren't doing it before. We didn't want to do it. ... I don't remember exactly our reasoning or why exactly, but it's something that we weren't doing that he's [Leslie] telling us to do." Post-Election Hr'g Tr. 47. Post-Election Hr'g U. Exh. 1. This change in who should be in the byline was not routine due to a system upgrade, it was a decision made as to how WYPR wanted to track its online content since they could now link the information from story to story. Post-Election Hr'g Tr. 54. Leslie could have very easily established the policy under the new system that all bylines should reflect the person's name that actually wrote the copy and they could track the pieces in that fashion.

Although Bienstock testified that Leslie had no authority to make changes as to what was on the website, Leslie's own actions seem to contradict that testimony. Post-Election Hr'g Tr. 104-05. When approached by Henkin about the show The Signal not getting enough exposure on the home page of the WYPR website, Leslie made the decision to implement a change to the website to feature The Signal more prominently on the website's home page. Post-Election Hr'g

Tr. 74. This was not a routine and ordinary decision, as determining what should be featured and how it would be featured on the station's home page could potentially effect the station's overall web traffic.

There is no indication that Leslie had to get approval for either the byline decision or the presentation of The Signal on the website. Though Bienstock testified at the post-election hearing that he's responsible for the interactive department (the website), he testified at least twice that his duty was to oversee the on air programming, not the website. Compare Post-Election Hr'g Tr. 101-02 with Post-Election Hr'g Tr.100 and Pre-Election Hr'g Tr. 11. In fact, there was no mention that Bienstock had any interaction with the website at the pre-election hearing or that Leslie was one of those individuals who directly reported to him. Pre-Election Hr'g Tr. 11-12. Additionally, as the Director of New Media the staff of the station perceive Leslie to be the manager of the website and go to him with their issues and concerns, both technical and substantive. See *supra* pp. 21-23. The evidence clearly depicts that Leslie has the discretion to make policy decisions as to the website and serves in a managerial role in his capacity as Director of New Media. The Union's challenge to his ballot should be sustained. As such he should be excluded from the unit and his ballot should not be counted with respect to the representation election held on July 30, 2014.

3. Kyle Leslie is Closely Identified with Management.

The Board's rules also exclude "persons closely identified with management" as being proper observers to a representation election. NLRB Casehandling Manual (Part Two) Sec.11310.2; *Bosart Co.*, 314 NLRB 245 (1994); *Sunward Materials*, 304 NLRB 780, 781 (1991); *Mid-Continent Spring Co.*, 273 NLRB 884 (1985); *Peabody Engineering Co.*, 95 NLRB 952 (1951). This rule is in place in order to maintain the laboratory conditions the Board strives

for in elections. *Id.* The Board examines several factors to determine whether the observer/employee has been “placed in a position where employees would reasonably believe that she[he] is the agent of the Employer.” *Southland Frozen Foods*, 282 NLRB 769, 770 (1987). As for Leslie, this was most certainly the case.

One factor the Board will look at in determining whether one is closely identified with management, is whether the individual has conducted any sort of training for employees. *Sunward Materials*, 304 NLRB at 780. Leslie facilitated the scheduling of training sessions with NPR for an eight week (one session per week) webinar training whereby producers at various stations, including WYPR, were taught how to improve their content and posting to the websites. Post-Election Hr’g Tr. 65, 87-88. Following the NPR training component, Leslie also conducted follow-up sessions to go over the important concepts from the training. Post-Election Hr’g Tr. 87-88. Employees were required by Leslie to attend this training. Post-Election Hr’g Tr. 66. As the website is updated, Leslie goes to employees to conduct one-on-one training sessions to show them how to properly provide their text, photo, and web content to the WYPR website. Post-Election Hr’g Tr. 64, 89-90.

Another factor that is considered when examining whether an election observer is closely identified with management is whether the individual in question monitors other employees’ work. *Sunward Materials*, 304 NLRB 780. In *Sunward*, management’s election observer monitored the driving habits of employees, but caused no disciplinary action to be taken against such employees that may have violated the employer’s safe driving policies. *Id.* The employees were aware of this monitoring. *Id.* Similarly, at WYPR, Leslie monitors employees’ postings on WYPR’s website, questions them when he has concerns about how content has been posted to the website, and provides feedback on the number of hits certain postings have received on the

website. Post-Election Hr’g Tr. 44-45, 47, 67-69, 83-84; Post-Election Hr’g U. Exh. 1. It also appears that Leslie has complete control over the station’s Twitter feed as employees have to submit any suggested postings to him. Post-Election Hr’g Tr. 88-89.

The Board also looks to see if the employee serves as a channel for information between the employer and the employees. For instance, in *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980), the employer’s observer was ultimately found not to be a statutory supervisor, but, given his duties the Board held that “he relayed information from management to employees and had been placed by management in a strategic position where employees could reasonably believe he spoke on its behalf”. In *B-P Custom Building Products*, the individual in question spoke at two meetings of employees, one with management present and one which the individual handled on his own. *Id.* It is undisputed that Leslie has run meetings of employees. Post-Election Hr’g Tr. 87-88. It is also undisputed that Leslie has communicated with employees regarding how to perform their duties in relation to the WYPR website. Post-Election Hr’g Tr. 44-45, 47, 67-68, 72; Post-Election Hr’g U. Exh. 1.

The notion that Leslie is a channel of communication between management and the WYPR employees is further supported by management’s treatment of Leslie. Bienstock described Leslie as a “sort of interface between the program department and other departments into getting things onto our website.” Post-Election Hr’g Tr. 102. An interface by definition is a “communication or interaction” or to interface would mean “to meet or communicate directly; interact, coordinate, synchronize, or harmonize with (often followed by with)”. Dictionary.com. *Dictionary.com Unabridged. Random House, Inc.* <http://dictionary.reference.com/browse/interface> (accessed: September 29, 2014). If Bienstock is in fact in charge of the website as he so claimed in the post-election hearing, then management is

in charge of the website, and Leslie's communications with employees about how things are to be posted on the website, training sessions, feedback on the web content can reasonably be construed as Leslie relaying information from management to the employees. Post-Election Hr'g Tr. 101-102, 104-105. Post-Election Hr'g Em. Exh. 4. Leslie has such discretion to speak on behalf of or do management's bidding that employees go to him, rather than the program director (who also happens to be a show host and supervisor), about how shows are represented on the website and he responds accordingly. Post-Election Hr'g Tr. 62-63, 73-74. This interaction between Leslie and the WYPR employees makes sense since Leslie is the "interface" and "has been placed by management in a strategic position where employees reasonably believe he [speaks] on its behalf." Post-Election Hr'g Tr. 102. *B-P Custom Building Products*, 251 NLRB at 1338.

Bienstock, however, contradicted his own testimony from the pre-election hearing (where he was even given specific names to corroborate as direct reports by opposing counsel) in the post-election hearing, so it is difficult to ascertain who actually is a direct report to Bienstock. Compare Pre-Election Hr'g Tr. 11-12 with Post-Election Hr'g Tr. 101-02 [at the pre-election hearing, Bienstock testified that Rodricks, Kast, Henkin, McCord, Bob White, Lisa Morgan, and all of the board operators including Matthew Tacka, Nathan Sterner, Diane Finlayson, and Thomas Welch reported to him, but at the post-election hearing that list of direct reports grew by ten people to also include Leslie, Ken Jackson Desmarias, Anirban Basu, Will Gramling, Milton Kent, Tom Pelton, High Sisson, Al Spoler, David Zurawick, and Elizabeth Tracey (whom the Employer ultimately conceded was not even an employee nor was she appropriately designated in the unit)]. Post-Election Hr'g Em. Exh. 4. As such, it is difficult to ascertain what is "truth" and what is "fiction" as to whom, if anyone, Leslie actually reports to. If Bienstock's original

testimony at the pre-election hearing was accurate, whereby Leslie does not report to Bienstock, then that supports the employees understanding that Leslie oversees his own department. Post-Election Hr'g Tr. 43, 71. It also supports Leslie referring to himself as "a manager of his own department" to other employees. Post-Election Hr'g Tr. 77. As such, it would hold to reason that Leslie was a part of WYPR's management structure.

Leslie's title further lends support to the position that he is actually part of the management structure at WYPR, or at the least closely identified with management. Leslie is one of only three employees on the programming side of the station that holds a "director" title. Post-Election Hr'g Tr. 43, 76; Post-Election Hr'g U. Exh. 1. The other two individuals who hold a "director" title are Vice President/Program Director Bienstock and News Director McCord. Post-Election Hr'g Tr. 43, 76; Post Election Hr'g Em. Exh. 4. Neither Bienstock nor McCord are listed on the *Excelsior* list as part of the bargaining unit, WYPR recognizes them as management, and the WYPR employees hold them out to be in management positions. The title that WYPR conferred on Leslie, "Director of New Media", adds credence to other employees' understanding that Leslie is part of the management team.

Another factor that the Board will consider when determining whether one is closely identified with management is whether the individual in question receives benefits that other similarly situated employees do not. *Sunward Materials*, 304 NLRB at 781. One of those benefits includes one's own office where that is not afforded to other similarly situated employees. *Id.* There was significant testimony as to the physical layout of WYPR. It is clear that Bienstock and Brandon as undisputed managers clearly have their own standalone offices. Post-Election Hr'g Tr. 74, 93. The testimony elicited that Leslie, Rodricks, Kast, Tom Hall, Jamyla Krempel, and Thomas Welch had their own offices. Post-Election Hr'g Tr. 92, 96-97.

The offices of Kast, Tom Hall, and Jamyla Krempel are within a bigger office space encompassing the Maryland Morning bullpen. Post-Election Hr’g Tr. 91-92, 95-96. Rodricks’ office is within a bigger office space encompassing the Midday bullpen. Post-Election Hr’g Tr. 90-92. Leslie was able to retain his standalone office on the second floor even after more senior employees on the production staff were forced to move out of offices and into cubicles on the first floor. Post-Election Hr’g Tr. 92-93. Leslie is separated from the rest of the programming department and his office is actually located amongst the underwriting staff – a completely different department. Post-Election Hr’g Tr. 90. The benefit of one’s own standalone office, separate from the production department and shows again supports the notion that Leslie is more like management than he is the other employees in the programming department.

Yet another aspect to examine with respect to whether an individual is closely identified as management is whether the individual attends supervisory meetings. *Mid-Continent Spring Co.*, 273 NLRB 884, 884 (1985). An employee witnessed Leslie going into Brandon’s office for a manager meeting. Post-Election Hr’g Tr. 75-76. The Employer attempts to discredit the witness’ testimony with testimony of their own from Bienstock, however, Bienstock seems to stumble over his own testimony from the pre-election hearing. In the pre-election hearing regarding the Employer’s claim that Kast and Rodricks were supervisors, Bienstock testified that both Kast and Rodricks attended manager only meetings whereby those meetings were “roughly once a month until earlier this year [2014] when Tony Brandon who calls the meet[ings] went on a long trip and then required back surgery.” Pre-Election Hr’g Tr. 40-41. According to Bienstock, those meetings fell off after that point. Pre-Election Hr’g Tr. 41.

In the post-election hearing, however, Bienstock testified that there were three types of meetings: general staff meetings, interdepartmental meetings, and senior management meetings.

Post-Election Hr'g Tr. 110. Bienstock testified that the only people who attend the senior management meetings are Bienstock, Brandon, Vice President of Underwriting and Sales Carla Truax, and Business Manager Crompwell, but that this group had not had such a meeting this year (2014). Post-Election Hr'g Tr. 124. Bienstock stated that Leslie did not attend these meetings, but that Leslie, along with a representative from each of the departments (whether a manager or not), attends the interdepartmental meetings and those meetings fell off earlier this year (2014). Post-Election Hr'g Tr. 110-11. The interdepartmental meetings that Bienstock described in the post-election hearing in an attempt to discredit Leslie's supervisory or managerial status (or being closely identified with management) sound strikingly similar to those supposed manager only meetings that Rodricks and Kast supposedly attended when Bienstock was testifying that they were supervisors. Compare Pre-Election Hr'g Tr. 40-41 with Post-Election Hr'g Tr. 110-12, 123-24. It appears that the basis for Bienstock's testimony lies in whatever "truth" he would like the Board to believe rather than actual fact. As such, Bienstock's testimony as to whether Leslie attends manager meetings, along with any other testimony that Bienstock gave at either hearing, should be discounted. As such, the testimony should stand that Leslie attended manager meetings or at the least that other employees at the station perceive Leslie to attend manager only meetings. Post-Election Hr'g Tr. 75-76.

WYPR management has put Leslie in such a position that even if it is found that Leslie is not a supervisor or manager as defined by the Act, he is most definitely closely identified with management. Leslie conducts continuous training of employees that are perceived as mandatory, he dictates how content is to be supplied and posted to the website, he monitors employees' work on the website and provides feedback and directives accordingly, he listens to employees' concerns about the website and takes actions on those concerns, he has control over WYPR's

Twitter postings, he maintains his own office, he has attended manager only meetings, he is one of three people in the programming department that holds the title of “director” along with two undisputed managers, and he self-identifies to staff as the manager of his own department. See *supra* pp. 26-32. As such, Leslie is in such a position that the standard is met in that he “could reasonably be viewed by the employees as closely identified with management.” *Sunward Materials*, 304 NLRB at 780-81. See also *B-P Custom Building Products*, 251 NLRB at 1337-38. “[T]he Board has held that the use of such observers by an employer warrants setting aside the election since it is a fundamental deviation from the Board’s established rules for the conduct of an election” whether there was interference or not. Citing *Mid-Continent Spring Co.*, 273 NLRB at 884. See also *International Stamping Co.*, 97 NLRB 921, 923 (1951). Since Leslie served as WYPR’s observer at the July 30, 2014 representation election, by the Board’s own rules of conduct, the only appropriate remedy is to set aside the election and order a new election be held.

IV. CONCLUSION

For the reasons set forth above, SAG-AFTRA respectfully requests that the Employer's Motion in Limine continue to be denied, that the Board's challenge as to the ballots of Kast and Rodricks be overruled inasmuch as they are not Section 2(11) supervisors and that they be properly placed in the petitioned for unit and their ballots counted, that the Union's challenge as to Leslie be sustained on the basis that he is a statutory supervisor or manager as defined under the Act and that he is not appropriately in the unit. As such his ballot should not be counted, and that a rerun election be ordered on the basis that Leslie served as the Employer's observer at the July 30, 2014, election despite being a statutory supervisor or one closely identified with management.

Respectfully submitted,



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SUBMITTED: October 1, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on October 1, 2014, I electronically filed the above PETITIONER'S POST-ELECTION HEARING BRIEF with Region 5 of the National Labor Relations Board, and a copy was sent via electronic mail to Your Public Radio Corporation's representatives at:

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Anne P. Raulerson, Esq.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

**SAG-AFTRA, WASHINGTON, MID-
ATLANTIC LOCAL, AFL-CIO,**

Petitioner,

and

**YOUR PUBLIC RADIO CORPORATION
(WYPR),**

Employer.

Case No.: 05-RC-130206

EMPLOYER'S POST-HEARING BRIEF

The Employer in the above-referenced case, Your Public Radio Corporation ("WYPR"), through its undersigned attorneys, submits this Post-Hearing Brief.

I. INTRODUCTION

Following a representation petition filed by SAG-AFTRA ("the Union") with Region 5 on June 6, 2014, Hearing Officer Scott Y. Bryson held a hearing on June 20, 2014, to litigate the Section 2(11) supervisory status of Daniel Rodricks and Sheilah Kast. The Regional Director concluded that both Rodricks and Kast possessed the authority to effectively recommend hire, and, thus, were supervisors within the meaning of Section 2(11). He then directed that an election be held on July 30, 2014. On July 31, 2014, the Board denied the Request for Review the Union filed with respect to the Regional Director's finding of supervisory status as to Rodricks and Kast. Although it denied the Union's Request for Review, the Board permitted Rodricks and Kast to vote subject to challenge. After the election, the Union filed an Objection

to the election, alleging that Kyle Leslie is a supervisor or is closely identified with management so he should not have been permitted to serve as WYPR's election observer.

The Regional Director set a hearing before Hearing Officer Chad Horton for September 24, 2014. At the hearing, the Hearing Officer took administrative notice of the transcript of the June 20 hearing and the Regional Director's decision regarding Rodricks's and Kast's supervisory status and explained that only "new" evidence was to be presented. Accordingly, the only issues to be decided are (1) whether Kyle Leslie is a statutory supervisor or is closely aligned with management such that he should be disenfranchised of a vote and of his rights under the Act, and (2) whether the Union presented evidence that warrants the reversal of the finding that Rodricks is a Section 2(11) supervisor on the ground that he has the authority to effectively recommend hire.¹ Both questions must be answered in the negative.

II. FACTS

A. The Union Failed to Meet its Burden to Prove that Kyle Leslie is a Statutory Supervisor or is Closely Identified with Management.

1. Kyle Leslie is Not a Supervisor.

Kyle Leslie, WYPR's New Media Director, does not possess or exercise a single Section 2(11) indicium to be deemed a supervisor. In his role, Leslie is responsible for ensuring that WYPR's Website operates smoothly, though he has no authority to change the site's format or change its contents. (*See* Tr. at 104-105.) Rather, Andrew Bienstock, WYPR's Program Director in charge of all WYPR programming, has the authority to make such changes. (*Id.* at 104-105.)

Leslie reports directly to Bienstock. (Empl. Exh. 4; *see* Tr. at 101-102.) WYPR's organizational chart makes clear that no employees report to Leslie. (Empl. Exh. 4; *see* Tr. at

¹ The Union presented no evidence regarding Kast. It effectively has admitted that the Regional Director's conclusion as to her Section 2(11) status should stand.

101-102.) Additionally, Leslie has no role in the hiring, firing, or discipline of any WYPR employees. (Tr. at 102-103.) Leslie does not interview applicants and has no role in the laying off, promoting, or transfer of employees. (*Id.*) Leslie does not assign work to any employee, and he is not held personally accountable for any employee's work performance. (Tr. at 102-104.) Additionally, Leslie does not resolve workplace or personnel complaints of other WYPR employees. (*Id.*) Leslie does not fill in for any supervisors at WYPR. (Tr. at 104.)

Bienstock testified that Leslie's day-to-day interaction with other WYPR employees is limited to helping them with uploading audio content to WYPR's website. (*Id.*) Bienstock elaborated that WYPR employees "can use [Leslie] as a resource." (*Id.*) Aaron Henkin, the producer of WYPR's weekly arts program "The Signal," claimed that Leslie addressed Henkin's "concern" that The Signal was not being properly displayed on the website. (*See* Tr. at 73-74.) The Union presumably introduced this testimony to show that Leslie resolves workplace grievances, but it fails to establish more than the fact that Leslie interacted with his co-workers in a manner necessary to operate the website, consistent with Bienstock's testimony.

Bienstock also testified that Leslie did not manage any WYPR employees. (Tr. at 102-103.) Though Henkin testified that Leslie managed Louisa Jonas (Tr. at 78), Bienstock testified that he managed Jonas and that it actually was Tony Brandon, WYPR's General Manager, who made the decision to terminate Jonas's employment (Tr. at 105.) Specifically, Bienstock explained that Jonas was hired in 2007 or 2008 in an attempt to monetize the website and when she was unsuccessful in this endeavor, "[Brandon] decided to lay her off." (*Id.*) Moreover, the Record is bereft of any specific testimony or evidence to establish how and to what extent Leslie "supervised" Jonas. Thus, the Union did not establish that Leslie possessed a single Section 2(11) indicium with respect to Jonas. (*See* Tr. at 71-80.) In any event, it is irrelevant to this

case whether Leslie was a Section 2(11) supervisor five years ago. The Record establishes that he was not a supervisor when the election at issue occurred and that he is not a supervisor now.

2. The Record Demonstrates that Leslie Is Not Closely Identified with Management.

The Union also failed to establish that Leslie is closely identified with management. Leslie's interaction with his co-workers essentially is limited to ensuring that WYPR's website operates smoothly. This is borne out not only by Bienstock's testimony but also that of Leslie's co-workers Matthew Purdy and Aaron Henkin, both of whom testified for the Union. Purdy testified that Leslie helps producers post their segments to WYPR's website. (*See* Tr. at 44.) Indeed, Leslie's role is to assist WYPR staff in uploading aired content to the station's website when such assistance is needed. (Tr. at 104.) Additionally, Leslie, as part of his job, places content onto the WYPR site that is created by National Public Radio ("NPR"). (*See* Tr. at 55, 104-105.) Leslie has no role in formulating WYPR policy. (Tr. at 105-106.) As Purdy admitted, there is no manual or set of policies that governs employees' use of the WYPR website. (Tr. at 54.) It follows that Leslie is not in a position to create, implement or communicate policies or rules that do not exist. Thus, nothing in the Record establishes that Leslie formulates any policies related to the operation of WYPR's website.

a. Leslie does not possess or exercise independent discretion regarding the website or its contents.

Leslie exercises no discretionary authority over the WYPR website format or its contents. (Tr. at 104-105.) While Henkin testified that Leslie determines how content appears on the site, he provided no basis for that statement, nor did he offer any specifics on how Leslie allegedly "determines" how content appears on the site. (Tr. at 73.) Rather, as discussed above, the WYPR website is based on a format provided by NPR that Leslie has no authority to alter. (Tr. at 104-105.) The station pays \$35,000 per year to NPR for the right to use that platform. (*Id.*)

Leslie has no say in what platform is used, and he does not have the discretion to change or deviate from that platform or to change the contents displayed on it. (*Id.*) Only Bienstock has that discretion. (*Id.*)

b. Leslie does not communicate WYPR policy or work rules to employees on behalf of management, and he does not relay employee information to management.

There is no evidence that Leslie relays employee information to management. Leslie does not report information about employees to management and is not expected to in the future. The Union's evidence establishes only that Leslie, from time-to-time, advised WYPR employees of the website's requirements and limitations, consistent with his job duties. (Tr. at 104-105.)

Indeed, the Union introduced an e-mail from Leslie to Purdy and Stephanie Hughes in which Leslie asked Purdy and Hughes if there was "any reason" they were not placing bylines in Maryland Morning stories posted to the website, pointing out that doing so "allows for easy tracking in content searches." (U. Exh. 1.) In a later e-mail, Leslie wrote that he was giving them a "reminder" that there "should" be a name in the by-lines slot, again pointing out that this allows for author tracking. (*Id.*; see Tr. at 47.) In the e-mail, Leslie does not instruct Purdy and Hughes that they must do so, that WYPR policy required that they do so, or that management would discipline them if they failed to do so in the future. Indeed, in Leslie's own words, the e-mail is a "reminder" about what "should" be done regarding a ministerial formatting issue. (*See id.*) This e-mail, thus, is in line with the most important aspect of Leslie's job, ensuring that the website operates smoothly. (*See* Tr. at 104-105.) The Union's Exhibit 1 in no way establishes that Leslie communicates policy to employees on behalf of management. No reasonable employee would read Leslie's e-mail as a communication of policy or rules from management.

Rather, a reasonable employee would read the e-mail as advise as to the mechanical requirements and limitations of the WYPR website.

Leslie also provided similar advice to Henkin, who testified that Leslie sometimes notifies him that copy he has written for the site is “too long” and does not “cooperate with the mechanics of the site.” (Tr. 67.) Henkin later clarified that the sentences he submits for use in gliders were occasionally too lengthy to fit in their entirety within the website’s formatted size allotment. (Tr. at 68.) Leslie did not give Henkin specific instructions on revising the sentence, other than “let[ting] him know” that it was too long to fit on the site. (*Id.*) Leslie’s role here is limited to advising employees of the mechanical requirements and limitations of the website platform that Leslie does not control. (*See* Tr. at 104-105.) This testimony aligns with Bienstock’s testimony that Leslie had no authority to alter the format or the contents of the website.

c. Leslie does not provide training to employees.

As stated above, WYPR does not have any policies or procedures on which Leslie, as New Media Director, could train other WYPR employees. (*See* Tr. at 54-55, 104-106.) Leslie does not conduct work-related trainings. Leslie, instead, uses his technical knowledge, on an *ad hoc* basis, to explain to other employees how to use the features of the site that WYPR obtains from NPR. (*See* Tr. at 64.) Indeed, while Henkin testified that Leslie “teaches” him how to place content on the website (Tr. at 64), he admitted that he generally places the content onto the site himself and that Leslie does not review that content before it is placed onto the site (Tr. 85). Similarly, Henkin testified that Leslie “trains” employees on how to use new iterations of the WYPR website platform, however, Henkin did not testify as to the frequency of the alleged training. (*See* Tr. at 64.) Henkin’s testimony implies that Leslie explains to employees technical

features of the website on a one-on-one, *ad hoc*, basis as Henkin did not testify that during any of these alleged “trainings” did Leslie discuss WYPR-mandated procedure. (*See id.*) Giving such general advice does not mean that Leslie is closely identified with management when that advice is in no way related to any WYPR policies or procedures. (*See* Tr. at 54-55, 104-106.)

As the employee most familiar with the website platform provided by NPR, Leslie facilitated the scheduling of WYPR employees with webinars given by NPR regarding its platform. While Henkin also claimed that Leslie “arranged” for employees to attend an eight-part webinar over the course of eight weeks, he admitted that the webinar was produced and presented completely by NPR. (Tr. at 65-66.) Henkin also testified that the webinar was not given specifically for WYPR employees; rather, it was simulcast to many other radio stations around the country, including WYPR. (Tr. at 88.) Henkin claimed that the webinar was “required” but did not explain whether there was any consequence for failure to attend. (Tr. at 66.) Though Henkin testified that Leslie spoke with WYPR employees regarding the webinar presentations, he conceded that Leslie merely reiterated to employees how to perform functions that the NPR trainers had covered in the webinar. (Tr. at 87-88.) Again, based on his technical abilities, Leslie is the only person at WYPR who could have done this for NPR.

d. While Leslie has an office, other non-supervisory and non-managerial employees, including eligible voters, also have offices, and Leslie’s office is not located near those of other managers.

Many WYPR employees who were eligible to vote in the election have an office, including Leslie, whose is located on the second floor of the station. (Tr. at 74.) Leslie’s office is near a group of station underwriters who are not managers. (*Id.*) In addition, eligible voters Tom Hall, Jamyla Krempel, and Thomas Welch all have offices. (Tr. at 97.) Henkin testified that he had an office himself until sometime last year. (Tr. at 93.) The Union, thus, cannot use

Leslie's having an office to conflate Leslie with management given that other WYPR eligible voters have offices. Moreover, Leslie's office is separate from the offices of WYPR management. Bienstock has an office on the second floor, but it is located on the opposite side of the building, far away from Leslie's office. (Tr. at 93.) Tony Brandon, WYPR's General Manager, has a corner office on the first floor of the station, located on a separate floor from Leslie's office. (Tr. at 74.) WYPR's business managers have offices near Brandon's office on the first floor, as does Liza Matthews, who works in development. (*Id.*) These offices are nowhere near Leslie's office. Not only do several non-supervisory, non-managerial employees have offices at WYPR, the managerial employees have offices separate from Leslie, so the fact that Leslie also has an office can in no way convey to his co-workers that he is associated or identified with management.

e. Leslie does not attend management meetings.

The Union failed to establish that Leslie attends management meetings. Bienstock explained that there are three types of employee meetings held at WYPR: senior management meetings, interdepartmental meetings, and all-employee meetings. (Tr. at 110.) Leslie was not invited to, and never has attended, any senior management meetings, which are limited to Bienstock, Brandon, Carla Truax, WYPR's Vice President of Underwriting and Sales, and Brian Cromptwell, WYPR's Business Manager. (Tr. at 110, 124.) Bienstock testified that these senior management meetings have been held on a monthly basis in previous years. (Tr. at 124.) Representatives from each department are invited. (Tr. at 110.) Interdepartmental meetings, though, are not restricted to supervisory or managerial personnel; in fact, eligible voters Elizabeth Gamer, Tom Hall, Hughes, and Purdy have attended such meetings. (Tr. at 110-111.) Leslie attends these meetings when they are held. (Tr. at 110, 124.)

Meanwhile, Henkin claimed that Leslie attended weekly “management” meetings. (*See* Tr. at 83.) However, Henkin admitted that he did not know what was discussed in any such meetings, and he did not know how often Leslie allegedly attended such meetings. (Tr. at 83.) When pressed by the Hearing Officer, Henkin estimated that Leslie – who has worked for WYPR since 2006 – does not actually attend “weekly” meetings, but has attended a total of five to seven such meetings the entire time he has worked at WYPR. (Tr. at 83.) It appears that Henkin has misidentified such interdepartmental meetings as “manager” meetings even though they are attended by non-management employees, including other eligible voters.

B. The Union Did Not Proffer Any New Evidence to Undermine the Regional Director’s Finding that Sheilah Kast and Daniel Rodricks are Statutory Supervisors.

1. The Union Did Not Proffer Any New Evidence with Respect to Sheilah Kast.

The Union did not offer any evidence regarding Sheilah Kast. At the opening of the hearing, the Hearing Officer took administrative notice of the June 20 hearing transcript and the Regional Director’s July 7 decision finding Rodricks and Kast to be Section 2(11) supervisors. (Tr. at 7-8.) Thus, the facts are uncontested and establish that Kast is a supervisor.

2. The Union’s Proffered New Evidence with Respect to Daniel Rodricks Further Evidences that He Effectively Recommends Hire.

With respect to Rodricks, the Union must proffer new evidence which justifies the Regional Director reversing his earlier finding that Rodricks is a supervisor. While the Union attempted to argue that the hiring process at Midday has “changed” in some way, the Union’s evidence actually supports the position WYPR has maintained throughout this case. Indeed, since the first hearing, Rodricks continues to participate in the hiring process, effectively recommending the hire of the employees for his show.

Following the resignation of Producer Jonathan Ehrens on June 20, 2014, Rodricks, with the assistance of Gamer, began interviewing candidates, and, by July 8, 2014, had interviewed three candidates. (Empl. Exh. 1.) The e-mails establish that Rodricks and Gamer had selected two of the three, Harvie and James Daley, as “a good fit for our team – even if it’s for a temporary period.” Gamer acknowledged in this email that she understood “there might be a need to post the position online to fulfil a legal obligation.” (*Id.*). In addition, Gamer states in the email that the show was “going live” again on July 16 – *i.e.*, it had been off the air. (*Id.*) This undercuts the sense of immediate urgency to hire a new producer following Ehrens’s resignation suggested by Gamer when she testified. (Tr. at 16-17, 24-25.) On August 4, 2014, Rodricks sent Bienstock an e-mail recommending Harvie for hire, stating that “she gave the most impressive interview.” (Empl. Exh. 5.)

On August 11, Brandon e-mailed Rodricks, authorizing Rodricks to hire a temporary employee until WYPR had complied with FCC requirements. (U. Exh. 3.) Specifically, the e-mail explained that the FCC required WYPR to consider minority and female candidates for available positions. (*Id.*) Brandon also stated that he had “authorized Midday to hire a temporary person to fill the job until a reasonable number of candidates are interviewed.” (*Id.*) (emphasis added). The next day, Brandon asked Rodricks to have Harvie speak to Bienstock about salary, and notified Rodricks that Midday should interview ten candidates to satisfy the FCC requirements. (*Id.*) Brandon also said in that e-mail to “let me know when...a decision has been made whether [Harvie] is your final choice or you decide on another candidate.” (U. Exh. 4) (emphasis added).

This is consistent with Gamer’s admission that Harvie talked to Bienstock only about salary, at which point Bienstock extended her a job offer. (Tr. at 19.) It also shows that

Bienstock and Brandon left candidate selection up to Rodricks, as they have in the past.

Bienstock testified that he did not perform any independent review of Harvie's application materials before she was hired. (Tr. at 109, 125.) Bienstock did not interview Harvie, and he looked at, but did not read, Harvie's resume which Rodricks had sent to him. (Tr. at 125; Empl. Exh. 5.) Bienstock told Harvie that her position could become permanent because "[Rodricks] and [Gamer] were both very high on her." (Tr. at 109.) Moreover, Gamer admitted that, as far as she was aware, Brandon did not independently interview Harvie. (Tr. at 29.)

Brandon followed up with Rodricks on September 12, 2014, asking about the status of the interviewing process. (Empl. Exh. 2.) Gamer replied on Rodricks's behalf because Rodricks was on vacation. (*Id.*) Gamer said that "[Rodricks] has conducted at least 5-7 of these interviews" and that the final interviews had been scheduled. (*Id.*) (emphasis added). Gamer also suggested that Brandon speak with Rodricks "about exactly where he is on the process." (*Id.*) (emphasis added). On September 22, Brandon again asked Rodricks for an update, and Rodricks responded, "we've interviewed 10 candidates . . . I'm back at work Tuesday and will give Brian the paperwork." (*Id.*). These e-mails establish that Rodricks remains in overall charge of the candidate selection process on Midday, to the point that the "paperwork" regarding the ten interviews necessary to fulfill FCC requirements could not be given to Crompwell until Rodricks returned from vacation.

In sum, the evidence the Union presented at the hearing shows that Rodricks continues to exercise his authority to effectively recommend hire. None of the evidence in the Record supports the conclusion that Rodricks, for some reason, no longer possesses this authority. Brandon and Bienstock do not independently interview, review, or select candidates for hire. These duties remain Rodricks's; Brandon's e-mail supports this fact as it establishes that

Brandon expects Rodricks to effectively recommend hire while ensuring WYPR comply with various FCC requirements.

III. ARGUMENT

The Union bears the burden of proof on every issue in this case. With respect to Leslie, the party asserting a challenge “has the burden of proving that the individual is not eligible to vote.” *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1050 (2003). The party asserting that an employee is a Section 2(11) supervisor bears the burden of proof because a supervisor loses protection of the Act, including being disenfranchised of a vote. *See Sheraton Universal Hotel*, 350 NLRB 1114, 1115 (2007). Board elections are not lightly set aside “and the party seeking to overturn the election . . . bears the burden of proving that objectionable conduct interfered with the results of the election.” *Labriola Baking Co.*, 361 NLRB No. 41 (Sep. 8, 2014) (*citing Safeway, Inc.*, 338 NLRB 525 (2002)). The Union has failed to meet its burden of proof to establish that Leslie should lose the protection of the Act and be deprived of a vote, and, accordingly, it has failed to meet its burden to prove that the election should be set aside.

With respect to Rodricks and Kast, WYPR already met its burden of proving their supervisory status at the June 20, 2014, hearing. The Hearing Officer took administrative notice of the Regional Director’s prior finding. Thus, the Union must proffer new evidence sufficient to warrant a different result. The Union, however, failed to do so, introducing no new evidence regarding Kast and introducing new evidence regarding Rodricks that further supports the conclusion that he possesses the authority to effectively recommend hire.

A. Kyle Leslie Is Not a Section 2(11) Supervisor, Cannot Be Closely Identified with Management, and Is Not a Managerial Employee.

1. Kyle Leslie Is Not a Section 2(11) Supervisor.

The party asserting supervisory status bears the burden of proof. *NLRB v. Ky. River Cmty. Care*, 532 U.S. 706, 711 (2001); *Sheraton Universal Hotel*, 350 NLRB at 1115. A purported supervisor must actually possess and exercise at least one indicia of Section 2(11) status in the interest of the employer and must do so using independent judgment. *Ky. River Cmty. Care* 532 U.S. at 711; *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). The party asserting supervisory status bears the burden of proof. *Ky. River*, 532 U.S. at 711; *Sheraton Universal Hotel*, 350 NLRB at 1115. The Board and federal appellate courts repeatedly have held that Section 2(11) status should be found sparingly, as such a finding strips a supervisor of the protection of the Act. *Talmadge Park Inc.*, 351 NLRB 1241, 1243 (2007); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006); *Tree-Free Fiber Co.*, 328 NLRB 389, 390 (1999); *East Village Rehabilitation Center v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *Williamson Piggly Wiggly v. NLRB*, 827 F.2d 1098, 1100 (6th Cir. 1987); *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970).

The Union completely failed to produce any evidence that Leslie possesses a single indicium of Section 2(11) authority. The Record demonstrates that Leslie does not have any involvement in hiring, firing, discipline, rewarding, promotion, transfer, or adjusting grievances, nor does he ever effectively recommend such action. Accordingly, the Union has not met its burden of establishing Leslie as a Section 2(11) supervisor such that Leslie should have been disqualified as WYPR's election observer.

2. Kyle Leslie Is Not Closely Identified with Management.

An employee who is “closely identified” with management may not serve as an election observer. *Smithfield Packing Co.*, 344 NLRB 1 (2004). The Regional Director’s September 9, 2014, Report on Challenges and Objections contains the following listing of factors the Board generally considers when making this finding:

Whether the person conducts training for employees; conducts orientations for new employees; serves as a conduit of information between management and employees, including dissemination of employer rules and policies and receiving employee complaints; monitors employees’ work; participates in the employer hiring process; administers tests to new hires; has an office, use of a company-owned vehicle, or has other benefits not granted to similarly situated employees; and participates in supervisory meetings or functions.

Bd. Exh. 1(g) (*citing Sunward Materials*, 304 NLRB 780, 780-81 (1991); *Mid-Continent Spring Co.*, 273 NLRB 884 (1985); *B-P Custom Building Prods.*, 251 NLRB 1337, 1337-38 (1980)).

Leslie possesses none of these characteristics. The Union offered no evidence to establish that Leslie monitors employees’ work, conducts new-employee orientations, participates in the hiring process, or administers tests to new hires. The Union’s testimony was on the following factors: (1) training, (2) conduit of information between management and employees, (3) has an office, and (4) attendance at “manager” meetings. They are discussed in turn below.

a. Leslie is not responsible for the training of WYPR employees.

The Record establishes that Leslie does not train WYPR employees. Rather, he provides *ad hoc* advice to his co-workers about how they can better work with the WYPR website and he coordinated his co-workers’ attendance of a series of webinars run by NPR on changes to the platform of NPR’s website.

Even assuming *arguendo* that the Board determines that this constitutes “training,” an employee who conducts training is not closely identified with management where the employee has no authority to change the policies, procedures, or topics on which the training is given. *Ozburn-Hessey Logistics*, 357 NLRB No. 136, Slip Op. at **259-62 (Dec. 9, 2011) (finding that employee was not someone employees would closely identify with management where Record established that she had no authority to change the content of the training and did exactly what her supervisor did when she conducted trainings). Moreover, an employee’s conducting trainings solely related to the employee’s job function does not establish the employee as closely identified with management. *Compare Magna Int’l, Inc.*, Case 07-CA-430931, 2001 NLRB LEXIS 134 (ALJ, Mar. 9, 2001) (finding employee not closely identified with management where employee responsible for all safety and health training of workforce because his individual job duties “were strictly limited to the area of safety and health” so that employees would not reasonably view him as associated with management) *with Sunward Materials*, 304 at 780 (finding employee closely identified with management where employee worked as “compliance/training specialist” who conducted monthly on-site safety and training sessions for employees, all of which were determined by management and covered the employer’s handbooks and regulations).

Here, if the Record in some way establishes that Leslie provides some form of training to WYPR employees, the type of purported training provided by Leslie is not of the type that would closely identify Leslie with management because the training solely relates to Leslie’s job duties. Leslie lacks the flexibility to change the policies covered by the training, and Leslie’s merely facilitates the training models given by NPR. The Record is clear that Leslie explains technical aspects of the WYPR website to employees and connects those employees to webinars regarding

the platform and use of the website conducted by NPR. The topics of Leslie's alleged training, thus, are limited to his job duties, like those in *Magna International* where the employee at issue was not found to be closely identified with management on the theory that other employees would not reasonably associate an employee with management where that employee only gives trainings that specifically relate to the employee's job duties.

Additionally, not only does WYPR not have a technology-related handbook or any technology-related procedures, Leslie lacks the authority to alter the platform or the content of the WYPR website, so any training he may be found to have given related to the website cannot associate him with management, like in *Ozburn-Hessey* where the employee at issue was not closely identified with management because he could not change the content of the trainings. Moreover, with respect to the webinars run by NPR, Leslie connects WYPR employees to the webinars and, at times, reiterates to WYPR employees the topics of the webinars already covered by NPR. As *Ozburn-Hessey* also demonstrates, merely providing training identical to that already provided by a supervisor does not liken one to management. Thus, even if Leslie's technical advice and guiding of employees to webinars is deemed training, it is of such a nature that could not liken Leslie to management in the eyes of other WYPR employees.

b. Leslie is not a conduit of information for WYPR management.

The "conduit of information" factor generally arises in the Section 2(13) agency context. *See, e.g., Einhorn Enterprises*, 279 NLRB 576 (1986) (agent "relayed confidential information obtained from management to rank-and-file employees"); *Southern Bag Corp.*, 315 NLRB 725 (1994) (agent was "an authoritative communicator of information on behalf of management"); *Victor's Cafe* 52, 321 NLRB 504, fn.1 (1996) (agent was "the usual conduit for communicating management's views and directives to employees, from the time of their hiring through their

daily accomplishment of their tasks”); *Zimmerman Plumbing and Heating Co.*, 325 NLRB 106 (1997) (agents “acted as the conduits for relaying and enforcing company decisions, directions, policies, and views”).

In order to be a “conduit of information” for management, that employee must communicate work rules, policies, or management directives to employees, or report information to management about employees. As Bienstock testified without contradiction, Leslie does not report information to management regarding employees. Moreover, the communications from Leslie to his co-workers about the functioning of the website are not management-driven. Presumably, the Union relies on its Exhibit 1 and the testimony of Purdy and Henkin that Leslie instructs them in how to use the website. However, as Purdy himself said, there is no manual or set of rules associated with the site. There are no management directives that exist with respect to the site. With respect to Union Exhibit 1, there is no evidence that employees are required by management to include by-lines in their online content. Thus, Leslie was not communicating a management directive to his coworkers. Rather, he was offering them his own suggestions specifically related to his job duties so that the stories could be searched and found on the website. The same is true of Leslie’s notifying Henkin from time-to-time that his glider was too long to fit on the site’s template. In doing so, Leslie was not giving Henkin a management instruction. Rather, he was trying to provide Henkin advice based on his experiences working with NPR’s website platform. Communicating with employees about technical, ministerial issues related to his job duties hardly can qualify Leslie as a conduit of information for management.

c. Leslie’s having an office does not closely-identify him with management.

That an employee has an office is not *per se* indicative of a close alignment with management. If the employee has an office, the Board also will consider the “location of the

individual's office and its proximity to management personnel” to determine if the employee is closely identified with management. *Vestal Nursing Center*, 328 NLRB 87, 96 (1999). As stated above, at least three other eligible voters, Hall, Krempel, and Welch, also have offices like Leslie. Moreover, Leslie’s office is located away from the “executive suite” on the first floor of the station, where Brandon’s office is located and on the opposite side of the building from Bienstock’s office. Leslie’s office, meanwhile, is located near the offices of several underwriters who are not identified with management. It stands to reason that if a significant number of non-managerial employees have offices, employees at WYPR would not associate having an office with management, especially if that office is separated from managers’ offices.

d. Leslie does not participate in supervisory meetings.

Leslie does not attend manager-only meetings. He has attended all-employee meetings, which, predictably, are attended by all WYPR employees, as well as interdepartmental meetings. As Bienstock testified, non-supervisory employees regularly attend interdepartmental meetings, including other eligible voters Gamer, Hall, Hughes, and Purdy. Accordingly, there is nothing about those meetings that would lead any WYPR employee to associate them with management. Though WYPR holds senior management meetings, Leslie has never attended such a meeting. Presumably, Bienstock is in a position to know whether Leslie has attended these meetings because Bienstock attends them himself. While Henkin testified that Leslie attended “manager meetings,” he admitted that he knew nothing about these meetings, such as who attended them or how many such meetings Leslie allegedly attended. Ultimately, Henkin guessed that Leslie, a WYPR employee since 2006, only attended between five and seven of these meetings, or roughly less than one meeting per year. Thus, even if Henkin’s testimony that Leslie attended

“manager meetings” is credited², according to Henkin, Leslie attended these so-called manager meetings with such irregularity (less than ten percent of the time based on Bienstock’s testimony that senior management meetings were held once a month) that no reasonable WYPR employee would associate Leslie with management.

3. Kyle Leslie’s Alleged Relationship with Louisa Jonas Does Not Make Him a Section 2(11) Supervisor or Closely Identify Him with Management.

The Union introduced testimony that purportedly establishes that Leslie exercised Section 2(11) authority with respect to Louisa Jonas, an employee who has not worked at WYPR since 2009. For the reasons below, the Union fails to meet its burden with this evidence.

First, Bienstock testified Brandon was responsible for the management of Jonas when Jonas worked at WYPR five years ago, from 2007 or 2008 to 2009. Indeed, it was Brandon, not Leslie, who made the decision to terminate Jonas, whom WYPR hired for financial purposes. Meanwhile, the Union failed to present any specific evidence regarding the nature of Leslie’s alleged supervision of Jonas. For instance, the Record is bare as to the level of his involvement in her hiring, whether he ever disciplined her, whether he granted her pay raises or other benefits. The Union, thus, has failed to establish that Leslie exercised any Section 2(11) indicia several years ago such that in no way can Leslie be found to be a Section 2(11) supervisor or closely identified with management today.

Even assuming *arguendo* that Leslie exercised Section 2(11) authority with respect to Jonas from 2007 to 2009, such a finding is insufficient to render him a supervisor or closely identified with management in 2014. The Board has long held that the appropriate inquiry is whether a purported supervisor possesses Section 2(11) authority at the relevant time, here, when

² To the extent Henkin’s and Bienstock’s testimony conflicts on this point, Bienstock should be credited. He had clear recall of the meetings and was able to clearly describe the three categories of employee meetings at WYPR, whereas Henkin was completely unsure in his testimony.

the election occurred. *Avante at Wilson*, 348 NLRB 1056, 1057 (2006) (reversing the Regional Director's finding that staff nurses were Section 2(11) supervisors because "the Employer offered no evidence to show that the individuals working as staff nurses at the time of the hearing possessed that authority" where the hearing took place in 2002 and one of the staff nurses last possessed that authority in 2000); *Connecticut Humane Society*, 358 NLRB No. 31, Slip Op. at **73-74, 95 (Apr. 12, 2012) (affirming the ALJ's finding that the purported supervisor was protected by the Act, reasoning that evidence of supervisory authority from August 2001 until June 2009 "is not relevant to the determination of her status in December 2009 when she was terminated"); *Volair Contractors*, 341 NLRB 673, 674-75 (2004) (finding that the employee in question's change from position in which he directed work of two employees and recommended hire to position at another building in which he did not direct the work of any employee "was a significant change in his position that cast doubt on the continuation of his authority to fire workers and effectively recommend others for hire" six months after change).

The Board's cases could not be clearer: even if Leslie did supervise Jonas for a brief period of a few months in 2008 or 2009, Leslie did not possess any Section 2(11) authority over any WYPR employee in July 2014. The removal of supervisory authority from the purported supervisors as recently as two months (*Connecticut Humane Society*), six months (*Volair Contractors*), and two years (*Avante at Wilson*) before the litigation of their status was sufficient to prohibit a finding of Section 2(11) authority. Jonas was terminated by Brandon and left WYPR in 2009, five years before the election in this case. Accordingly, any supervisory relationship Leslie had with Jonas cannot be used by the Union to impute supervisory status to Leslie now. Moreover, that previous relationship cannot establish that Leslie somehow was closely identified with management when the election was held.

4. Kyle Leslie Is Not a Managerial Employee.

The Union did not specifically allege in its Objection that Leslie is a managerial employee, and the Regional Director set a hearing on the issues of (1) Leslie's supervisory status and (2) whether he is closely aligned with management, not whether he is a managerial employee. In doing so, the Regional Director likely surmised that no factual issue was raised with respect to this issue. Accordingly, the Union failed to raise it and, therefore, has waived any argument on this point. *See Los Angeles Times Commc'ns LLC*, 2006 NLRB Reg. Dir. Dec. LEXIS 76 at *20-21 (March 16, 2007) (recommending that new issue raised by Employer during course of hearing not be considered and evidence not permitted where new issue did not fall "within the scope of any . . . objections set for hearing").

Still, based on statements in its opening argument, it seems the Union might argue in its brief that Leslie is a managerial employee. Even if this argument is entertained, which WYPR submits it should not be, Leslie is not a managerial employee. Under Board law, managerial employees "formulate and effectuate high-level employer policies" and/or exercise independent discretion regardless of, and apart from, existing company policy. *General Dynamics Corp.*, 213 NLRB 851, 857 (1974); *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). The Board generally will not exclude an employee from the protection of the Act due to managerial status "unless he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *The Republican Co.*, 361 NLRB No. 15 (Aug. 7, 2014) (citing *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005)).

The Record contains no evidence to support a finding of managerial status. Leslie has no role in formulating or implementing any WYPR policies. Indeed, WYPR does not even have specific policies that relate to Leslie's job duties. Additionally, Leslie does not have independent

discretion in performing his job. Specifically, he cannot deviate from or alter the NPR website template and does not have any authority to change the content on WYPR's website. Leslie's job is to maintain WYPR's website and ensure that it functions. Moreover, as argued at length above, for the reasons that Leslie is not closely identified with management, it also follows that Leslie is not a managerial employee.

B. The Union Failed to Introduce Evidence Sufficient to Undermine the Regional Director's Decision as to Dan Rodricks's Supervisory Status.

In advance of this hearing, WYPR filed with the Region a Motion in Limine to exclude any further evidence as to Rodricks's or Kast's supervisory status. (Bd. Exh. 1(i).) For the reasons stated therein, WYPR objects to the Region further considering any issue already has litigated and decided by the Region and the Board. *See* Rules and Regs. at § 102.67(f); *Hafadai Beach Hotel*, 321 NLRB 116 (1996) (denial of request for review barred relitigation of jurisdictional issue in subsequent related proceeding); *675 W. End Owners Corp.*, 345 NLRB 324 (2005) (employer's failure to request review of dismissal of objections constituted bar to employer later raising same issues in subsequent phase of litigation).

However, even if the Regional Director does consider the additional evidence the Union introduced, he should reach the same conclusion. As the Regional Director previously noted, when determining whether an individual effectively recommends hire, the Board "examines the amount of weight the employer affords the recommendation" that a purported supervisor makes. DDR, 7/7/14, at 14 (*citing USF Reddaway, Inc.*, 349 NLRB 329, 340 (2007)). A recommendation is effective if a higher-level of management implements it without conducting its own independent investigation. *Chevron USA*, 309 NLRB 61, 65 (1991); *Passavant Health Center*, 284 NLRB 887, 891 (1987); *Beverly Manor Convalescent Center*, 275 NLRB 843, 945-946 (1985).

None of the evidence proffered by the Union changes the fact that Rodricks effectively recommends hire.³ To the contrary, the new evidence submitted by the Union bolsters WYPR's argument and the Regional Director's determination that that Rodricks effectively recommends hire. Shortly after Ehrens resigned, Gamer contacted Bienstock to tell him that Rodricks and she had interviewed three candidates and had concluded that two of them, Harvie and Daley, would be "good fits on our team – even if it's for a temporary period." WYPR ultimately hired Harvie on a temporary basis, pending Rodricks's compliance with FCC requirements for interviewing and hiring minority and female candidates. As Brandon stated in an e-mail, he "authorized Midday to hire a temporary person to fill the job until a reasonable number of candidates are interviewed." (U. Exh. 3). The next day, Brandon told Rodricks in an e-mail to "let me know when...a decision has been made whether [Harvie] is your final choice or you decide on another candidate." (U. Exh. 4) (emphasis added). Bienstock did not review Harvie's application materials prior to following Rodricks's recommendation. According to Gamer, Bienstock talked to Harvie only about salary before offering her the temporary job. The next month, Brandon inquired about the interview process for a permanent candidate, and Gamer responded when Rodricks was on vacation that Rodricks had conducted five to seven of the ten required interviews.

None of the applicants were independently interviewed by Bienstock or Brandon. The fact that Brandon took steps to ensure that FCC requirements were met does not undercut the fact that Rodricks continues to control the candidate interview and selection process for Midday. The testimony of Bienstock and Gamer established no other independent evaluation of Harvie before she was offered the job; rather, it was Rodricks's independent evaluation of Harvie that led to her

³ As noted earlier, the Union presented no evidence regarding Kast's supervisory status. The Union, thus, effectively has admitted that the Regional Director's conclusion as to Kast's Section 2(11) status should stand.

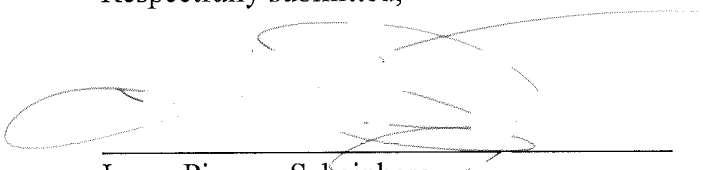
hire. Clearly, the Union has failed to show that Rodricks no longer possesses the authority to effectively recommend hire. To the contrary, the evidence the Union itself introduced into the record reinforces the fact that Rodricks has the authority to effectively recommend hire, as he always has.

IV. CONCLUSION

For the foregoing reasons, the Regional Director should overrule the Union's Objection and Challenges, and should direct that Kyle Leslie's ballot be opened and counted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2014, a copy of the foregoing Post-Hearing Brief was e-filed with the Fifth Region, and a copy was sent by electronic mail to the following representatives of SAG-AFTRA:

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